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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1709

CLARK E. THOMAS,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

REPLY BRIEF OF PETITIONER

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STATE OF FLORIDA,
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REPLY BRIEF OF PETITIONER

Petitioner seeks a Writ of Certiorari to the Supreme Court of Florida for violation of Constitutional Rights under the Fifth and Fourteenth Amendments where the Defendant was charged by Grand Jury indictment with first degree murder and proceeded to trial before a Circuit Court with a jury of twelve being impaneled and sworn, and discharged by the court without legal cause, the Defendant being thereafter subjected to double jeopardy when tried and convicted for the identical offense with six jurors before another court, the Criminal Court of Record.

WHETHER FEDERAL REVIEW IS CUT OFF BY RES JUDICATA WHERE THE STATE COURTS DECLINED TO CONSIDER FEDERAL CONSTITUTIONAL ISSUES, PROPERLY RAISED, BUT NEVER CONSIDERED.

Respondent's position is intent on avoiding consideration of the petition on the merits by an untenable procedural argument claiming a decision on "state" issues.

In response to argument of *res judicata,* Rule 3.850, Florida Rules of Criminal Procedure, by its own terms, recognizes the right to petition and release, "upon the ground that the sentence was imposed in violation of the constitution or laws of the United States". Petitioner here seeks just such relief for violation of his federal constitutional rights by subjecting him to double jeopardy, in violation of the Federal Constitution.

The record discloses that Petitioner did attempt an appeal in 1972 with no federal issues determined. In 1975, Petitioner *in propria persona* filed his Rule 3.850 motion to vacate and set aside the judgment of sentence and conviction, raising the federal constitutional question of double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Upon denial, an appeal raising the federal constitutional question of double jeopardy was dismissed as frivolous and certiorari thereafter refused by the Florida Supreme Court. Each of the Florida courts presented with the claim of double jeopardy under the United States Constitution has refused to consider the matter.

Petitioner is not here arguing "state" grounds, but violation of the Petitioner's federal constitutional rights, and accordingly, Respondent's reliance on *Fay* v. *Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963) and *N.A.A.C.P.*

v. *Alabama,* 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958), involving "independent and adequate *state* grounds", is misplaced and faulty, not only because no "federal" issues purported to be decided by the appeal in the state court, but state procedure allows the federal constitutional issue not theretofore considered to be raised under Rule 3.850, Florida Rules of Criminal Procedure, just as was done in this case. In fact, in *Fay* v. *Noia,* supra, this court granted relief for double jeopardy where the same identical argument was made and rejected. The hornbook rule relied upon by Respondent applies to state substantive grounds, or procedural grounds, but in no way prevents consideration of the federal question in granting relief. This court observed "the fatal weakness of this contention" that *Noia's* defeat in state court would cut off review by the Supreme Court of the United States of the state proceedings which refused him relief. *N.A.A.C.P.* v. *Alabama,* supra, was an attempt in proceedings by the Attorney General of Alabama enjoining the N.A.A.C.P. from conducting further activities in that state and to produce its membership list. In granting relief, this court, in noting the hornbook rule, found that federal jurisdiction to review a judgment of a state court on a federal question is not defeated by the court's reliance on a non-federal ground which is without any value or substantial support.

Likewise, reliance on the Florida decisions of *Suarez* v. *State,* 220 So.2d 442 (3DCA Fla. 1969); and *Culberson* v. *State,* 224 So.2d 363 (2DCA Fla. 1969), declining to reconsider "state" issues, under Rule 3.850, where already fully determined on an earlier appeal, is unsupportive and no bar to this court granting relief for violation of the Petitioner's rights under the United States Constitution. The appeal, in 1972, with no federal issues considered or de-

termined, is consequentially not res judicata as to federal issues.

Nor did the Supreme Court of Florida, on appeal, sub judice, purport to express its view of federal law, so that *Herb* v. *Pitcairn,* 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459 (1945), relied upon by Respondent, has no application.

Respondent misconceives the doctrine of *res judicata,* which is ordinarily a defense to be asserted to bar a second prosecution under a new indictment for the same offense, even where the Defendant is not placed in jeopardy in the first prosecution. *United States* v. *Oppenheimer,* 242 U.S. 85, 61 L.Ed. 161, 37 S.Ct. 68, 3 LRA 516. Also, see *Cousins* v. *Wigoda,* 419 U.S. 447, 42 L.Ed.2d 595, 95 S.Ct. 541 (1975) cited at page 10 by Respondent, recognizing "the defense of *res judicata*" to be "pleaded and proved (as an 'adequate *state* ground') in the state trial court."

Constitutional guarantees against double jeopardy do not have the effect of abrogating or supplanting in criminal cases the common law principle of *res judicata,* which is available as an additional defense. *United States* v. *Oppenheimer,* supra; *Collins* v. *Loisel,* 262 U.S. 426, 67 L.Ed. 1062, 43 S.Ct. 618; *United States* v. *Marakar,* 300 F.2d 513, vacated on other grounds 370 U.S. 723, 8 L.Ed.2d 802, 82 S.Ct. 1573. Clearly, each of the cases relied upon by Respondent, where state courts relied upon state issues "resolved on adequate *state* grounds", is clearly inapplicable to Petitioner's assertion of double jeopardy under the Federal Constitution as raised herein.

Nor is the Respondent's inclusion of the order of the United States District Court, Middle District of Florida, denying Petitioner's Application for Writ of Habeas Corpus (Brief of Respondent, page 1; Appendix, pages 14-

15), more than an attempt to cloud the issue, to mislead, and prejudice Petitioner in the consideration of his assertion of double jeopardy. Such habeas corpus proceedings were no proper part of any state record below, nor could they properly be considered. *Res judicata* is not applicable in habeas corpus proceedings. *Sanders* v. *United States,* 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068; *Fay* v. *Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822; *Barrett* v. *Hunter,* (CA10 Kan) 180 F.2d 510, 20 ALR 2d 965, cert. den. 340 U.S. 897, 95 L.Ed. 650, 71 S.Ct. 234; *United States ex rel. Bergdoll* v. *Drum,* (CA2 NY) 107 F.2d 897, 129 ALR 1165, cert. den. 319 U.S. 648, 84 L.Ed. 1414, 60 S.Ct. 1098.[1]

Moreover, the habeas corpus order shows no evidence taken but that the ruling is based on the erroneous conclusion that the Circuit Court did not have jurisdiction. If res judicata is inapplicable to habeas corpus proceedings which could be hereafter sustained to present the identical question on the merits to this court, then Respondent's procedural argument to avoid consideration on the merits is without substance.

The very purpose of Rule 3.850, Florida Rules of Criminal Procedure was to permit a prisoner to raise violation of constitutional rights when no other procedural

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1. In the Federal Court, no Judge is "required" to entertain an application for habeas corpus by a federal prisoner where the legality of the detention complained of has been determined by a Federal Judge on prior application, 28 U.S. Code, Section 224(a), the granting of the writ being discretionary in any event. However, res judicata not being applicable to habeas corpus, the court is always vested with discretion in disposing of subsequent applications for relief, even though there has been a prior refusal to discharge on a like application. Moreover a prior determination on the merits is deemed made only if an evidentiary hearing was held. *Sanders* v. *United States,* 373 U.S. 1, 10 L.Ed.2d 148, 83 S.Ct. 1068. Thus, even a refusal of the Supreme Court of the United States to issue a writ of habeas corpus, being discretionary, is not an adjudication on the merits and is without prejudice to an application to any other court for the relief sought. *Ex parte Abernathy,* 320 U.S. 219, 88 L.Ed. 3, 64 S.Ct. 13.

remedy was available. Thus, Petitioner contends the Florida Supreme Court has refused, as did the District Court of Appeal, Fourth District, and the trial judge, to consider a federal question of substance, raised by Petitioner under Rule 3.850, viz.: Was the Petitioner subjected to double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

CONSIDERATION ON THE MERITS OF PETITIONER'S CLAIM OF DOUBLE JEOPARDY.

In consideration of the Petition for Certiorari on its merits, the issue is whether Petitioner was placed twice in jeopardy for the same offense. Respondent argues (1) that if Petitioner's counsel did not object to the discharge of the jury by the Circuit Court, (2) that in some mysterious fashion, *Furman* v. *Georgia*, 1972, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, caused the Circuit Court to lose jurisdiction contrary to *Donaldson* v. *Sack*, 265 So.2d 499, and *Laster* v. *Stephenson*, 268 So.2d 387, and that double jeopardy would not attach (3) because, "in the instant case, the trial judge stopped the trial before any testimony was taken and transferred the case", and (4) if there was no prosecutorial or judicial over-reaching, that Petitioner should be denied relief even if there was double jeopardy otherwise.

Numerous already cited cases attest to the proposition, as has been repeatedly stated, that in a jury case jeopardy attaches when a jury has been impaneled and sworn. In the recent case of *Crist, Warden, et al.* v. *Bretz et al.*, Case No. 76-1200, argued November 1, 1977, reargued March 22, 1978, and decided by this court on June 14, 1978, this court in denying certiorari, put to rest any question as to when jeopardy attaches in a jury trial, and

confirmed that federal, not state, law determines the issue of double jeopardy. Senior Judge Elbert P. Tuttle of the Fifth Circuit, sitting by designation for the Ninth Circuit in *Bretz* v. *Crist*, 546 F.2d 1336 (1976), concluded:

> "On the same day that the trial court dismissed the first information, the state filed a second two-count information. Count I accused the appellants of grand larceny, and tracked the language of Count I of the original information. * * * A new jury was impaneled, appellants' motion to dismiss on grounds that the prosecution placed them twice in jeopardy was denied, and appellants were found guilty. * * * After exhausting available state postconviction remedies, appellants sought and were denied habeas corpus relief by the district court." * * *
>
> "* * * In *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969), however, the Supreme Court eschewed Palko's 'approach to basic constitutional rights,' and found 'that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment'." * * *
>
> "* * * Relying on federal precedents, the *Benton* court held that . . . the same constitutional standards apply against both the State and Federal Governments." 395 U.S. at 795, 89 S.Ct. at 2063.
>
> "* * * But if the federal rule—that jeopardy attaches when a jury is impaneled and sworn, e.g., *Downum* v. *United States*, 372 U.S. 734, 735-36, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)—is of constitutional dimension, then jeopardy attached at the first trial and unless the mistrial declaration was consonant with the 'mani-

fest necessity' doctrine . . . the second trial was constitutionally impermissible." * * *

"(2) We reject at the outset the notion that while the double jeopardy clause constrains reprosecutions by the states, it countenances different constitutional applications in state and federal courts. * * * Each time the due process clause of the Fourteenth Amendment has been interpreted to encompass a particular guarantee of the Bill of Rights, the Court has explicitly reaffirmed the proposition that the same constitutional norms are to be employed in assessing the conduct of state and federal authorities. * * * *Benton's* declaration that 'the same constitutional (double jeopardy) standards apply against both the State and Federal Governments', *Benton* v. *Maryland*, 395 U.S. 784, 795, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), and its determination that 'the validity of (state) larceny conviction(s) must be judged . . . under this Court's interpretations of the Fifth Amendment double jeopardy provision.' 395 U.S. at 796, 89 S.Ct. at 2063, compel the conclusion that if the federal attachment of jeopardy rule is constitutionally mandated in federal courts, no different rule may be followed by state courts."

"(3) We hold that the attachment of jeopardy rule applied in *Downum*, *Somerville* and *Serfass* is a constitutional requirement of the Fifth Amendment which is binding on the states as well as the federal government. The rule itself serves as the lynchpin for all double jeopardy jurisprudence." * * *

"* * * Judge Harlan writing for the Court in *United States* v. *Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), clearly indicated the constitutional stature of the rule: 'the conclusion that "jeopardy attaches" when the trial commences expresses a judgment that

the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings.' 400 U.S. at 480, 91 S.Ct. at 555." * * *

"The Supreme Court has consistently applied the federal attachment of jeopardy rule to state cases." * * *

"*Breed* v. *Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346 (1975), resolves any doubt that federal standards determine when jeopardy attaches." * * *

Although the Respondent is concerned with whether or not the actions of the trial judge in discharging the jury sua sponte, without motion, and without declaring a mistrial, were "a proper exercise of the trial court's discretion", clearly there was not "manifest necessity", *Downum* v. *U. S.*, 1963, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100; *United States* v. *Perez*, 1824, 22 U.S. (9 Wheat.) 597, 6 L.Ed. 165, or "imperious necessity", *Wade* v. *Hunter*, 1949, 336 U.S. 684, 69 S.Ct. 834, 92 L.Ed. 974; *United States* v. *Perez*, supra. Clearly, the Circuit Court has jurisdiction and should have proceeded with the trial, *Furman* v. *Georgia*, supra, taking away no substantive rights of the Defendant, but merely declaring that the punishment or penalty of death upon conviction could not be imposed under a statute similar to that in Florida where the jury had discretion without guidelines to determine the imposition of the death penalty. As pointed out in *Laster* v. *Stephenson*, supra, the Circuit Court has jurisdiction to complete the trial, and the adjudication of guilt or innocence was not thereby affected by *Furman* or *Donaldson*, only the maximum sentence which could be imposed. The trial judge committed error in discharging the jury, thereby effectively acquitting the Defendant of the charges, with the result that the second trial constituted double

jeopardy. His action was similar to that of the judge in *United States* v. *Jorn*, 1971, 400 U.S. 740, 91 S.Ct. 547, 27 L.Ed.2d 543, where the Supreme Court found double jeopardy in discharging the jury and declaring a mistrial, finding that such arbitrary action of the trial judge could not support a finding of "manifest necessity".

Whereas Respondent contends that the action in discharging the jury was "not occasioned by prosecutorial or judicial over-reaching", the record discloses that, on objection of the Defendant's attorney, on the basis of *Furman*, the trial judge directly ruled that the Circuit Court had jurisdiction to proceed with the trial on July 17, 1972, as otherwise there would never have been a jury sworn and impaneled to try the case. Upon thereafter learning of the ruling in *Donaldson* v. *Sack*, supra, the judge sua sponte, without motion, discharged the jury over objection. Defendant's attorney had objected prior to trial to proceeding on the basis of the decision of the Supreme Court in *Furman*, but the trial judge discharged the jury because of *Donaldson* v. *Sack*, in the absence of any pending motions before the court. At the time that the Circuit Court judge discharged the twelve-man jury on July 17, 1972 he committed an error of law, because the Circuit Court had jurisdiction through July 24, 1972.

Moreover, on July 17, 1972, the Defendant had certain substantive rights through indictment by grand jury, and trial before a twelve-man jury before the Circuit Court. It will be noted that the Defendant alone was placed on trial before the Circuit Court. Thereafter, when the case proceeded on the second trial in the Criminal Court of Record, the Defendant was charged by direct information with a co-defendant, and not only was deprived of the right to indictment by grand jury, but was also subjected to trial before a jury of only six, along with the co-defendant, with a severance being denied. The evidence presented against the co-defendant at the second trial could not have been presented in the Circuit Court at the first trial, because the co-defendant could not have been called as a witness without granting immunity so that he would not have been a co-defendant at the second trial. In the Circuit Court, Petitioner's trial began on July 17, 1972; the co-defendant's trial was not scheduled until a later date.

No actions of Petitioner or his counsel were in any way responsible for, or caused, the discharge of the jury in Circuit Court. The Petitioner was not only subjected to double jeopardy in the second trial for the same offense, and lost the right to a grand jury indictment and a separate trial before a twelve-man jury, but was subjected to a trial before a six-man jury with a co-defendant upon information filed by the prosecutor.

Bretz v. *Crist*, supra, cert. den. by this court as recently as June 14, 1978, puts to rest the Respondent's contentions that if cessation of the first trial was "occasioned by prosecutorial or judicial over-reaching", that a retrial was not barred by principles of double jeopardy. Judge Tuttle in that decision observed:

> "* * * in *Smith* v. *Mississippi*, 478 F.2d 88, 93 (5th Cir.), cert. denied, 414 U.S. 1113, 94 S.Ct. 844, 38 L.Ed.2d 740 (1973), the Fifth Circuit analyzed the double jeopardy claim of a state prisoner as follows:
>
> > 'the (state's) contention that petitioner was not "put to trial" or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in Downum . . . and . . . Somerville . . . in both cases the Supreme Court held that

jeopardy attached when the first jury was selected and sworn. * * *' "

"The attachment of jeopardy rule addresses different concerns: (1) protecting the accused from the financial, physical and psychological enervation worked by repetitive prosecutions; and (2) preserving the accused's 'valued right to have his trial completed by a particular tribunal', . . . *independent of the threat of bad-faith conduct* by judge or prosecutor. We decline to substitute a contradictory state rule of the Supreme Court's judgment that these concerns reach constitutional critical mass when the jury is impaneled and sworn. * * *"

"* * * the Supreme Court has consistently recognized a major purpose of the double jeopardy clause as the protection of a defendant's 'valued right to have his trial completed by a particular tribunal,' *Wade* v. *Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949); accord, *United States* v. *Dinitz*, 424 U.S. 600, 603-607, 96 S.Ct. 1075, 1078-1080, 47 L.Ed.2d 267 (1976); *Illinois* v. *Somerville*, 410 U.S. 458, 469-71, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973): *United States* v. *Jorn*, 400 U.S. 470, 484-85, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *Downum* v. *United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). * * *"

CONCLUSION

The Petitioner was subjected to double jeopardy in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution, and certiorari should be granted.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by mail to Robert L. Shevin, Attorney General of Florida, Kenneth G. Spillias, Assistant Attorney General of Florida and Joy B. Shearer, Assistant Attorney General of Florida, 225 Pan American Building, West Palm Beach, Florida 33401, Counsel for Respondent, this 16th day of August, 1978.

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